***United States Court of Appeals***

***for the Second Circuit***

# PETITIONER'S REPLY BRIEF

75-4009

IN THE

# UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

## No. 75-4009

SALANT CORPORATION, d/b/a CARRIZO MANUFACTURING CO., INC.,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

On Petition to Review an Order of the National Labor Relations Board

## REPLY BRIEF FOR PETITIONER

**Carrizo Manufacturing Co., Inc.**

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This reply brief speaks only to certain matters raised in the brief of the National Labor Relations Board, and is submitted in an attempt to aid the court in focusing on the issues raised by the petition for review. Petitioner's comments will be directed towards the following issues: (1) The discharges of Carlos Juarez, Jr., Pedro Patlan, and Rebecca Patlan; (2) the alleged unlawful interrogation of Carlos Juarez, Jr.; and (3) the grant of benefits.

## I. THE DISCHARGE ISSUES

### A. Carlos Juarez and Pedro Patlan

Although the Board admits that the indicia of supervisory authority found in Section 2(11) of the Act must be read in the disjunctive, it then argues that these indicia must be read in the conjunctive insofar as the use of independent judgment is concerned (Brief p. 16). Petitioner agrees that the exercise of independent judgment is essential to a finding of supervisory status, but at the same time Petitioner would call the court's attention to the well accepted proposition that in order to be a supervisor one need only be found to exercise independent judgment with regard to **one** of the criteria set forth in Section 2(11). **Amalgamated Clothing Workers of America v. N.L.R.B.,** 420 F.2d 1296 (D.C. Cir. 1969). The fact that Juarez and Patlan may not have been clothed with **all** the indicia of supervisory authority is irrelevant—**one** is sufficient. The record is replete with examples demonstrating that both Juarez and Patlan exercised independent judgment in responsibly directing other employees; and this alone, even ignoring other indications of supervisory status, is sufficient proof that both were supervisory employees.

While Petitioner does not seek to argue matters extraneous to the record, it feels constrained to reply to certain points raised by the Board (Brief p. 20, fn. 7). The Board would infer a lack of supervisory status from the fact that department head McClain was present at the hearing but did not testify, the apparent inference being that if Patlan and Juarez were supervisors, McClain, their superior, would have testified to that effect. Beyond the fact that Petitioner may prove its case with whatever witnesses it chooses, it must be noted that the Board subpoenaed McClain as its witness. Thereafter the Board released McClain, whereupon he left the hearing. After having

subpoenaed and released Mr. McClain, it is now too late for the Board to attempt to support its findings by inferences drawn from the fact that McClain did not testify, and Petitioner submits that there is no basis in the record for any such inference.

B. **Rebecca Patlan**

There is no factual dispute regarding the reason Rebecca Patlan was discharged. Because of the sensitive nature of her position and her natural feelings toward her husband, it was clear that she could not work effectively with the management officials who were responsible for the discharge of her husband. The Board mischaracterizes this, however, by stating that Ms. Patlan was discharged because of her husband's participation in the employee meetings (Brief p. 22, fn. 9). Regardless of the characterization, it follows naturally that if her husband's activity is not protected due to his supervisory status, Ms. Patlan's discharge is likewise lawful.

Even assuming that Pedro Patlan's discharge was found to be unlawful, it cannot be said that Petitioner acted out of improper motives with regard to Rebecca Patlan. The real reason for Ms. Patlan's discharge, as reflected by the entire record without contradiction, was that she could not perform her job effectively because of her natural attitude about Petitioner's treatment of her husband. This course of action may appear harsh, but it is not unlawful.

## II. THE INTERROGATION

The conversation between Bill McClain and Carlos Juarez is grossly distorted in the Board's brief (Brief pp. 11-12). As noted in Petitioner's original brief, the conversation occurred in a natural setting, Juarez answered McClain's questions with candor, and no attempt was made to discover who had attended the meetings. The entire thrust of the conversation was an attempt by McClain to discern the source of employee discontent so that corrective action could be taken. As such, the conversation is well within the criteria for lawful questioning established by this court in the landmark case of **Bourne v. N.L.R.B.,** 332 F.2d 47 (2nd Cir. 1964).

## III: THE GRANT OF BENEFITS

Throughout its brief the Board refers to the employee meetings as **union** activity, whereas the testimony of the employees involved demonstrates that they were not concerned about organizing a union but rather were interested only in determining what their benefits were in an attempt to present their grievances to their employer (Tr. 300-301, A. 132-133). As such, the meetings may well have been manifestations of protected concerted activity, but it cannot fairly be said that the employees were engaging in **union** activity. Whereas in most instances the distinction is unimportant, in considering the lawfulness of a grant of benefits the distinction becomes crucial. As a matter of law, an employer cannot be said to have violated the Act by granting increased benefits in response to **concerted** activity, since such a holding would effectively preclude an employer from improving wages or working conditions in response to employee complaints. Only when the grant of benefits is for the purpose of dissuading employees

from engaging in **union** activity does it become unlawful, **cf., N.L.R.B. v. Cleveland Trust Co.,** 214 F.2d 95 (6th Cir. 1954). The record testimony of the employees involved reveals that at the time of the grant of benefits the employees were not seeking to join or form a union; therefore it follows that the grant of benefits could not have been effected in an attempt to discourage any union activity.

The Board takes issue with Petitioner's assertion that the grant of benefits had been **planned** prior to the employee meetings (Brief p. 14), but the uncontradicted testimony remains to the effect that Petitioner had an established plan to increase benefits well before any manifestation of employee discontent. In challenging this fact the Board (Brief pp. 13-14) points out that prior to the employee meetings President Lipshie told plant manager Stubblefield that he would be advised regarding the changes to be made in the employees' benefits. From this statement the Board would have the court infer that no decision had been made regarding the benefits program, but the more natural inference to be drawn is that President Lipshie's stated intention to inform Stubblefield of what changes will be made implies that **a decision had already been reached to make some changes.** Such being the case, the slightly expedited schedule for implementing the benefit program is clearly within the limits of **N.L.R.B. v. M. H. Brown,** 441 F.2d 839 (2nd Cir. 1971).

## CONCLUSION

Petitioner submits once more that the Board's decision not only contains legal conclusions that are erroneous but also is not supported by substantial evidence in the record considered as a whole. For these reasons, Petitioner requests the court to set aside the Board's decision to the extent that the decision finds that Petitioner has committed any unfair labor practices.

Respectfully submitted

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### Certificate of Service

This is to certify that a copy of Petitioner's Reply Brief has been served on the following named party by United States Mail, postage prepaid:

John Depenbrock, Attorney
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This 21st day of May, 1975.

Lowell W. Olsen